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IN THE

Supreme Court of The United States

OCTOBER TERM, 1968.

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

vs.

WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
JAS. H. MATTHEWS & CO. OF VIRGINIA,
and JAS. H. MATTHEWS & CO.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Norfolk Monument Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided November 14, 1968 (Appendix A) is not officially reported. The memorandum of the United States District Court for the Eastern District of Virginia; Norfolk Division, filed October 3, 1967, sustaining the motions of the respondents to dismiss the Complaint, is not officially reported (Appendix D).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3). The date of the judgment sought to be reviewed was entered November 14, 1968. There has been no order respecting a rehearing, and there has been no order granting an extension of time in which to petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

I. Whether and when agreement can be found in consciously parallel decisions by competitors to adopt substantially identical exclusionary restrictions with respect to installation and sale of grave markers, contrary to the Sherman Anti-Trust Act, 15 U.S.C.A. Sections 1 and 2.

II. Do the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the trading opportunities of the petitioner retail monument dealer?

III. Did the record show beyond doubt that the

petitioner can prove no set of facts in support of its claim, which would entitle it to relief under the Sherman Act?

IV. Did dismissal of the Sherman Act claim on the motion for summary judgment violate the admonition from the record of this case that dismissal should be sparingly practiced?

STATUTES INVOLVED

The statutes involved are 15 U.S.C.A., Sections 1 and 2, and Rule 56(c) (e), Federal Rules of Civil Procedure, as amended.

15 U.S.C.A. Section 1, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal."

15 U.S.C.A. Section 2, states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several States, or within foreign nations, shall be deemed guilty of a misdemeanor."

Rule 56(c) states:

> "The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may

serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56(e) states:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

The District Court granted summary judgment on the sole ground that petitioner failed to present evidence of a conspiracy among the respondents. The Court of Appeals for the Fourth Circuit affirmed in a two-to-one decision, with Judge Craven filing an exhaustive, forceful, persuasive dissent, which dissent petitioner asks this Court to adopt.

The basis for jurisdiction in the District Court was the Sherman Anti-Trust Act, 15 U.S.C.A., Sections 1 and 2.

From the Complaint, discovery depositions of Charlie C. Gregory, President of petitioner, and affidavits opposing summary judgment, appear the following facts material to the consideration of the questions presented. The record is full of examples of insufficiently explained parallel behavior on which a jury could reasonably find an agreement to violate the Sherman Act. Respondents adopt a remarkably uniform practice of charging prohibitive installation fees to permit the use of an outsider's grave marker, and other similar exclusionary rules and regulations, resulting in a concerted action to eliminate or exclude petitioner's trading opportunities. Despite the unskilled nature of the work, all of the memorial parks refuse to permit petitioner to install markers sold by it. All insist the work be done by the cemeteries themselves. None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries. All of the memorial parks require the payment of an installation fee by petitioner for installing markers purchased from the

petitioner. Although the actual cost of installation amounts to about Three Dollars ($3.00), yet the memorial parks charge petitioner enormous installation fees and the amounts charged are remarkably similar. The fees charged by Rosewood Memorial Park, Incorporated and Princess Anne Memorial Park, Incorporated for installing single and double bronze markers are identical, and fall within a range of Three Dollars ($3.00) for a single size marker of Greenlawn Cemetery Park Corporation. The installation fees charged for a double bronze marker by Rosewood, Woodlawn, Greenlawn and Princess Anne fall within a range of Twenty-One Dollars ($21.00). All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject nonconforming markers. The alloy content requirement is the same as markers manufactured by Jas. H. Matthews & Co., and the same as is suggested implicitly in a pamphlet called "Modern Cemeteries," distributed by Matthews to its customers. All of the memorial parks, except Roosevelt, are customers of Matthews. There have been numerous incidents and attempts by Greenlawn, Woodlawn and Princess Anne to dissuade lot owners from purchasing markers from petitioner. Matthews, in its pamphlet, "Modern Cemeteries," suggests a number of practices, which in effect erect competitive barriers to retailers other than the cemeteries themselves. Most of these practices have been adopted by the memorial park respondents as evidenced by affidavits in the record and by the rule books of Rosewood, Princess Anne and Greenlawn. There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews. This is at least the fourth time Matthews has been

named co-defendant with memorial parks in anti-trust actions attacking the same practices. Each of the previous actions, *Booth* v. *Jas. H. Matthews & Co.,* No. 60-418-Civ. (W.D. Pa. 1963); *Kaeppler* v. *Matthews,* No. 25618-Civ. (E.D. Pa. 1963); and *United States* v. *Jas. H. Matthews & Co.,* No. 16818-Civ. (W.D. 1958), was settled by a consent decree enjoining the specific practices complained of in this case. Such litigation would tend to educate the respondents as to common methods of doing business. The Matthews pamphlet, "Modern Cemeteries," refers expressly to the anti-trust troubles of the memorial park industry.

Respondent Woodlawn sells its double bronze marker at a two hundred percent (200%) mark-up over cost. Petitioner's supplier, Mier, Johan-Wengler, Inc., charges Seventy-six Dollars ($76.00) for a single marker and One Hundred Seventy-two Dollars ($172.00) for a double marker, thus making petitioner's wholesale cost greater than that of Woodlawn. The record contains evidence of petitioner's retail purchases from 1963 through 1966, that petitioner has charged an average price of One Hundred Seventy-five Dollars ($175.00) for single markers and Three Hundred Thirty-eight Dollars ($338.00) for double markers. Petitioner absorbs the installation fees charged by the memorial parks and does not pass same on to the customer. Petitioner is placed at an impossible competitive disadvantage by the enormous installation fees. In order to meet Woodlawn's price, petitioner must suffer a loss for each sale of a single marker to a Woodlawn lot owner of Sixty-one Dollars ($61.00), to-wit: The cost to petitioner is Seventy-six Dollars ($76.00), which added to the installation fee of One

Hundred Seventy-five Dollars ($175.00), totals Two Hundred Fifty-one Dollars ($251.00), whereas the retail sales price is One Hundred Ninety Dollars ($190.00). Petitioner can only make a gross profit of Twenty-eight Dollars ($28.00) on a double marker, to-wit: The marker cost to petitioner is One Hundred Seventy-two Dollars ($172.00), which added to the installation fee of One Hundred Seventy-five Dollars ($175.00), amounts to Three Hundred Forty-seven Dollars ($347.00), whereas the retail sales price is Three Hundred Seventy-five Dollars ($375.00). Woodlawn, however, has a gross profit of slightly less than Two Hundred Fifty Dollars ($250.00) per marker, although its marker is one inch smaller than that offered by petitioner. Thus, a jury could find that the installation-fee practice, together with the other practices of the memorial parks, is calculated to exclude petitioner from the market, resulting in extensive loss of marker sales by petitioner.

A jury could find that the installation fees charged by the memorial parks are not justified by the expense of perpetual care and maintenance. A maintenance form published by Matthews states that "water is the best cleansing agent" for the marker, which will not deteriorate, will not rust, and does not require perpetual care. Ample funds, from the sale of cemetery lots, exist under Virginia law under "endowment trust funds" to maintain the marker.

The record shows evidence that a jury could find the existence of a tacit agreement among the respondents to limit and destroy petitioner's trading opportunities. In addition to parallel behavior on the part

of the memorial park respondents, the record shows a jury could find that the respondents were mutually aware of the others' restrictive practices. There is direct evidence of frequent conferences between the memorial parks and representatives of respondent Matthews. Matthews has had at least four cases of anti-trust actions for identical practices. Matthews' pamphlet, "Modern Cemeteries," refers to the anti-trust problems and contains suggestions to circumvent legal entanglement and could be considered by a jury as joint invitation to participate in a tacit agreement to exclude petitioner from competing with their own retail sales of markers. The owners of Princess Anne and Rosewood Memorial Parks are identical.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I. The split decision of the Court of Appeals conflicts with the decisions of this Court in the following cases: *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Interstate Circuit* v. *United States*, 306 U.S. 208, 227, 59 S.Ct. 467, 83 L.Ed. 610, 620 (1939); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Eastern States Retail Lumber Dealers' Ass'n.* v. *U.S.*, 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Court held that "summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in

the hands of the alleged conspirators, and hostile witnesses thicken the plot."

In *Interstate Circuit* v. *United States,* 306 U.S. 208, 227, 59 S.Ct. 467, 83 L.Ed. 610, 620 (1939), the Court affirmed that in order to make out a case for the jury, it is not essential that the plaintiff establish a prior agreement. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act (where each competitor knew that cooperation was essential to successful operation of the plan)."

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the Court held that evidence that manufacturers have a unity of purpose or a common design and understanding in fixing wholesalers maximum resale prices justifies the finding of a conspiracy of the manufacturers to violate the Sherman Act.

In *Eastern States Retail Lumber Dealers' Ass'n.* v. *U.S.,* 234 U.S. 700, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), the Court ruled that in order to show a combination or conspiracy with the Sherman Act, no agreement need be shown under which the concerted action is taken, since it is elementary that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done.

Petitioner urges the Court to adopt the analytical dissent of Judge Craven, who wrote: "As I read the

record, it is simply full of examples of insufficiently explained parallel behavior from which a jury could reasonably find an 'agreement' to violate the Sherman Act. Moreover, the remarkable parallelism of conduct might reasonably be traced to sophisticated and subtle invitations extended by manufacturer Matthews to the trade. In evaluating 'motive and intent' I do not think it entirely without significance that manufacturer Matthews is not inexperienced in questions of anti-trust, about which I will have more to say later.

"Defendants have urged upon us that the remarkably uniform practice of charging virtually prohibitive installation fees to permit the use of an outsider's grave marker and the other similar exclusionary rules and regulations are prompted and justified by legitimate business and economic reasons. I shall attempt to demonstrate that a jury might reasonably conclude to the contrary, but before doing so, I should note that if the evidence supports a finding of concerted action to limit or exclude plaintiff's trading opportunities, such group action is a per se violation of the Sherman Act and hence is not subject to the test of reasonableness. . . ."

". . . Thus, a jury could find that the installation-fee practice, together with other practices of the memorial parks, is calculated virtually to exclude plaintiff from the market.

"The memorial parks contend that the installation fees charged are justified by the expenses of perpetual care and maintenance. Unquestionably, I think, a jury could find otherwise. . . ."

"Hence I see no reason why a jury could not reasonably reject defendant's story and find, on the contrary, that the defendant memorial parks insist upon an exorbitant installation fee in order to exclude plaintiff from competing with their own retail sales of markers. Such an inference seems to me strongly supported by evidence that (a) actual installation costs $3 plus unskilled labor of two men for perhaps an hour, (b) the best cleaning agent is plain water and (c) adequate funds for perpetual care are required by law to be derived from lot sale revenues and income from the $25,000 minimum care fund. To insist in the face of such a record that charging plaintiff an installation fee of as much as $175 per marker is so clearly related to expense incurred that no other inference may be drawn seems to me patently absurd. At the very least there is presented a material issue of fact.

"Thus, there is at best only questionable business justification for those parallel practices which tend to the virtual exclusion of plaintiff from the market. Further, I think the record presents an issue of fact for trial over whether the formation of those parallel practices resulted from individual or concerted action.

"Viewing the evidence most favorably to the plaintiff's case, *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), I think the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the plaintiff's trading opportunities.

"The evidence recited, supra, shows parallel behavior on the part of the memorial park defendants. That alone is not enough. Turner, *The Definition of Agreement Under the Sherman Act; Conscious Parallelism and Refusals to Deal,* supra, at 658. However, I think the record justifies the inference, and a jury could so find, that the defendants were mutually aware of the others' restrictive practices. Against the background of anti-trust litigation over identical practices (involving the defendant Matthews) such an inference seems clearly permissible. The Matthews pamphlet, 'Modern Cemeteries,' containing, supra, references to anti-trust problems and suggestions to circumvent legal entanglement, could, I think, fairly be characterized as a 'joint invitation' to participate in the tacit agreement here alleged. *Interstate Circuit* v. *United States,* supra. Moreover, as previously noted, the record does contain direct evidence of frequent conferences between the memorial parks and representatives of defendant Matthews, the alleged hub of the conspiracy.

"On facts closely analogous to those presented here, the Third Circuit has said,

> 'Our starting point in analyzing the evidence is the complete unanimity with which all the distributors refused to license features on first run to plaintiff and the substantial unanimity with which they gave the Boulevard (plaintiff's drive-in theater) a 28 day (delayed showing) status. . . . This *uniformity in policy* forms the basis of an inference of joint action.' *Milgram* v. *Loew's, Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951) (emphasis added).

"Thus, in *Milgram,* evidence of conspiracy was found in participation in, or in mere acquiescence in, parallel business practices, even without a showing of invitation and acceptance such as was present in *Interstate Circuit,* id. at 583-84.

"In this case, the defendants' entitlement to summary judgment is rested on testimonial denials of the existence of an agreement, coupled with plaintiff's failure to come forward with direct evidence. 'But in this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy.' *Milgram* v. *Loew's, Inc.,* 192 F.2d 579, 583 (3rd Cir. 1951). While a party opposing a motion for summary judgment cannot rest on conclusory allegations, *Robin Construction* v. *United States,* 345 F.2d 610, 614 (3rd Cir. 1965), the burden is upon the movant to establish that no issue of fact remains for trial. *Liberty Leasing Co., Inc.* v. *Hillsun Sales Corp.,* 380 F.2d 1013, 1014 (5th Cir. 1967). The defendants have, in my opinion, failed to come forward with an explanation for their parallel behavior which a reasonable juror could not disregard.

"Where the plaintiff's case necessarily turns on inference, and where it is not 'quite clear what the truth is,' *Poller* v. *Columbia Broadcasting Systems, Inc.,* 368 U.S. at 467, I would, in a conspiracy case, be disinclined to cut off the right to have a jury draw the proper inferences. *Poller* v. *Columbia Broadcasting Systems, Inc.,* supra; *Devex Corp.* v. *Houdaille Industries, Inc.,* 382 F.2d 17 (7th Cir.

1967); *Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478, 485 (5th Cir. 1966); *Wurzberg Bros., Inc.* v. *Head Ski Co.*, 276 F. Supp. 142 (D.N.J. 1967). Evidence of conscious parallelism raises fact issues requiring the trial judge to submit the issue of conspiracy to the jury. *Theater Enterprises* v. *Paramount Distrib. Corp.*, 346 U.S. 537, 542 (1954).

"Finally, I think we should not overlook the fact that one of the major evils against which the antitrust acts were designed to guard is the exercise of 'the power arbitrarily to enhance prices. . . .' *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 52 (1910). It is partially through the 'private prosecution' of these anti-trust suits that the congressional policy of protection of the public is implemented. I am not so naive as to suppose that mere admission of Norfolk Monument to competition will bring the high prices of grave markers tumbling down. But even a little competition may help—and a little competition can invite more."

In *United States* v. *Container Corporation of America*, 37 L.W. 4077 (decided January 14, 1969), in reversing the dismissal of the complaint charging a price-fixing agreement in violation of Section 1 of the Sherman Act, the Court said: "Inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition . . price is too critical, too sensitive of control to allow it to be used even in an informal manner to restrain competition."

CONCLUSION

Every person will sooner or later die. The memorial park is becoming more and more popular. Each person desires some form of remembrance, as having lived on this earth by way of a marker, or monument. The public is entitled to be protected by competitive prices on markers. The record shows that a jury could find that exorbitant installation fees, together with other practices, has deprived petitioner retail dealer in markers and monuments from competing with the memorial parks, who have acted in concert with the manufacturer Matthews.

It is respectfully submitted that the petition for writ of certiorari should be granted upon the cogent reasons set forth in the dissent of Judge Craven and that the decision of the Court of Appeals for the Fourth Circuit should be reversed with the direction to the District Court to try the case on its merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,230

Norfolk Monument Company, Inc.,
Appellant,

versus

Woodlawn Memorial Gardens,
Incorporated, et al.,
Appellees.

No. 12,231

Norfolk Monument Company, Inc.
Appellee,

versus

Woodlawn Memorial Gardens, Inc.,
Appellant

No. 12,232

Norfolk Monument Company, Inc.,
Appellee,

versus

Princess Anne Memorial Park,
Incorporated, and Rosewood
Memorial Park, Incorporated
Appellants.

Appeal from the United States District Court for the
Eastern District of Virginia, at Norfolk.
John A. MacKenzie, District Judge.

(Argued June 19, 1968 Decided November 14, 1968).

Before BRYAN, WINTER and CRAVEN, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum & Fine on brief) for Appellants, and Michael E. Bowerman, Bernard Glasser and Robert H. Patterson, Jr., (McGuire, Woods & Battle; Clyde W. Cooper, Jefferson B. Brown and Wm. C. Worthington on brief) for Appellees.

ALBERT V. BRYAN, Circuit Judge:

An antitrust combination and conspiracy, 15 USC 1, 2; 15 and 26, are charged by Norfolk Monument Company, Inc. to certain incorporated cemeteries in the Norfolk, Virginia area and also against the two defendants, Jas. H. Matthews & Co., Pennsylvania and Virginia corporations, respectively parent and subsidiary. The Matthews manufacture and sell bronze grave markers throughout the United States. Complainant is a retailer in Norfolk of burial stones and plaques.

The accusation is that for "many years" prior to the commencement of this suit, December 16, 1965, the defendants by agreement and concerted action have restrained the production, sale and distribution of such items, and have monopolized and attempted to monopolize interstate trade and commerce therein. Upon respondents' motion the suit was dismissed in summary judgment. We affirm.

The inimical conduct ascribed to the defendants in the complaint is this:

> "15. Defendants Matthews, Pennsylvania and Matthews, Virginia have prepared, and the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne have adopted, various restrictive devices to prevent, restrict and discourage sales of markers by plaintiff for installation in the cemeteries operated by the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne. These restrictions include, but are not limited to, the following:
>
> "(a) A requirement that all markers installed in the cemeteries operated by the co-conspirators Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne conform to a specific minimum bronze alloy formula, said formula being the identical minimum formula used by defendant Matthews, Pennsylvania in its manufacture of markers;
>
> "(b) A requirement that each marker not purchased from the cemeteries Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, where the marker is to be installed, be accompanied, at a substantial cost, by a certificate of analysis, prepared by an independent laboratory, attesting to the bronze alloy content of said marker; and

"(c) The assesment of an excessive and unreasonable installation, foundation and an alleged care charge, for all markers not sold by the cemetery where the marker is to be installed, said fee to include amounts substantially in excess of the actual cost of installation.

"(d) By the enactment and keeping in effect by Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, unreasonable and illegal rules and regulations, which make it virtually impossible for a lot owner to purchase a bronze grave marker from dealers, such as plaintiff;

"(e) By refusing to permit the plaintiff, or any other retail monument dealer, to install grave markers and the foundation therefor in said cemeteries;

"(f) That the excessive and unreasonable charges made by Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne for installation, foundation and alleged care, out of which it exacts an enormous profit, make it virtually impossible for plaintiff to compete in the sale of said markers with said Woodlawn, Rosewood, Greenlawn, Roosevelt and Princess Anne, because plaintiff cannot and does not exact any such charges."

Winnowing the defendants' uncontroverted assertions and plaintiff's concessa from the supporting and counter affidavits, interrogatories and depositions submitted with the motion, the trial judge found that the plaintiff failed to establish the combination or conspiracy, or the effectual or attempted monopolization, it laid to the defendants. His opinion threshes the record very thoroughly and demonstrates that the evidence does not disclose the

presence of these indispensable elements even to the point of tendering a genuine issue thereon. Norfolk Monument Company, Inc. v. Woodlawn Memorial Gardens, Incorporated, et al., ____ FSupp. ____ (E.D.Va. October 3, 1967). We accept this refinement of the proof.

There was simply no direct evidence proffered by the plaintiff of a concert of action amoung the defendants. The only things the cemetery defendants had in common was that they engaged in the operation of cemeteries; each sold burial lots and maintained them; and each sold grave markers or plaques and installed them. No joint activity is disclosed — not even conferences or meetings. The closest evidence to this point was that defendant Matthews' sales representatives frequently visited the cemeteries on business calls. This poverty of proof scarcely made an issue of any kind — certainly none for a jury.

Moreover, the complaint's allegations of conduct and circumstances suggesting a combination and monopoly failed for want of any tender of proof of them. The District Judge found the accusations wholly without foundation. On these points he said in his opinion:

> "Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admission that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.
>
> "Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's President of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery had no

Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer."

Our canvass of the record verifies the dearth of proof in the particulars the District Judge just noted. A principal factor in the plaintiff's contention of his exclusion from competition with the defendants is the cemeteries' regulation prohibiting outsiders from installing markers. The reasonableness of this rule was not weakened by the plaintiff's evidence and is on its face apparent, as the opinion manifests:

"Plaintiff's allegation that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regardless of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty to preserve the cemetery property, all as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof."

The chief feature urged as revealing conscious parallels of behavior by the defendant cemeteries — and thus evincing joint and concerted action — is the fee demanded for installing the markers. Of this item the trial court said:

"The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the

cemeteries for installation of markers, whether such charges be conscionable or unconscionable is not only borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges."

Moreover, the record points out that defendants' installation fees, in addition to being divergent, were arrived at by totally different pricing policies. One charged a flat fee regardless of marker size; while the others charged a fee computed on the square inches of marker surface area; and these fees differed significantly.

The exaction of the fee is accounted for by the memorial parks as embracing not alone the putting of the marker in place and keeping it clean, but also such items as the requisite constant watch over the condition of the markers, the repositioning of them when needed, and replacing them as necessary. The argument that the installation payment was designed solely to discourage plaintiff's sales by increasing the cost of its markers vanishes on consideration. Without it the cemeteries would be required to accept the plaintiff's markers without prospect of financial assistance in the attention to them in the future. No effort was made to show that the contributions to the Virginia statutory trust fund would suffice to provide the moneys necessary for this continued care. At all events, the standard of care may vary in different parks, and the requisite reserve is a matter of good business judgment — surely not a jury issue.

The District Judge, too, altogether justified the utilization of summary judgment for decision although, granted, it should be "sparingly practiced". Poller v. Columbia

Broadcasting System, Inc. 368 US 464, 473 (1962); cf. First National Bank of Arizona v. Cities Service Co., _____ US _____, 36 L.W. 4394 (1968). No prejudice is shown by the plaintiff and a fair dispatch of the case was accomplished.

Affirmed.

CRAVEN, Circuit Judge, dissenting:

Before it can be concluded that there has been a "contract, combination or conspiracy" sufficient to invoke Section 1 of the Sherman Antitrust Act, it must be found that there was an "agreement" (implied or express) between two or more persons or corporations. The issue presented by this appeal, "only glancingly dealt with by courts," is "whether and when agreement can be found in 'consciously parallel' decisions by competitors" to adopt substantially identical exclusionary restrictions with respect to the sale and installation of grave markers.[1]

In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the Supreme Court affirmed that in order to make out a case for the jury it is not essential that the plaintiff establish a prior agreement. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act [where each competitor knew that cooperation was essential to successful operation of the plan]." *Id.* at 227.

Even so, the court affirms the granting of summary judgment despite the warning in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." As I read the record, it is simply full of examples of insufficiently explained parallel behavior from which a jury could reasonably find an "agreement" to violate the Sherman Act. Moreover, the remarkable

1. The foregoing is a paraphrased application to this case of the introduction by Professor Turner to his authoritative article: Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

parallelism of conduct might reasonably be traced to sophisticated and subtle invitations extended by manufacturer Matthews to the trade. In evaluating "motive and intent" I do not think it entirely without significance that manufacturer Matthews is not inexperienced in questions of antitrust,[2] about which I will have more to say later.

Defendants have urged upon us that the remarkably uniform practice of charging virtually prohibitive installation fees to permit the use of an outsider's grave marker and the other similar exclusionary rules and regulations are prompted and justified by legitimate business and economic reasons. I shall attempt to demonstrate that a jury might reasonably conclude to the contrary, but before doing so, I should note that if the evidence supports a finding of concerted action to limit or exclude plaintiff's trading opportunities, such group action is a *per se* violation of the Sherman Act and hence is not subject to the test of reasonableness.[3] *Radiant Burners v. People Gas Co.*, 364 U.S. 656 (1961); *Fashion Originator's Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

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2 "[P]ast proclivity . . . to unlawful conduct may be of some significance where the [alleged conspiracy is identical in scope and nature to a previous one]." *Milgram v. Loew's, Inc.*, 192 F.2d 579, 584 (3rd Cir. 1951).

3. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958). The stock exchange, tobacco warehouses and trade association cases are rightly viewed not as an exception to the rule but as distinguishable because the presumed purpose of group action (generally with some degree of state control) is not to eliminate or exclude competition but, instead, to improve public service. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1962); *Board of Trade of Chicago v. United States*, 246 U.S. 213 (1918); *Asheville Tobacco Board of Trade v. Federal Trade Commission*, 263 F.2d 502 (1959). *See* Oppenheim, Federal Anti-Trust Laws 661 (2d ed. 1959). *4th Cir.*

Since the question is whether or not the case should be submitted to a jury, it can only be answered by a somewhat detailed analysis of what the evidence might be but for the granting of motion for summary judgment. There follows such an appraisal:

THE EXTENT OF PARALLELISM

The record discloses:

(1) Despite the unskilled nature of the work,[4] all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.

(2) None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries.[5]

(3) All of the memorial parks require the payment of an installation fee by the plaintiff for installing markers purchased from the plaintiff. The plaintiff plausibly maintains that the actual cost of installation comes to about $3. Yet, enormous installation fees are charged plaintiff, and there is remarkable similarity in the amounts charged:

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4. It is said by one of the defendants that installation consists of pouring concrete in a prefabricated form, placing the marker in the wet concrete, removing the form after concrete hardens, digging a hole of proper size at the grave site to a depth of five or six inches and laying the marker and foundation in the excavation. Greenlawn's Answer to Interrogatories, Vol. 1, pp. 130, 131. The cost of the mortar is said to be about $3. Affidavit of Charles C. Gregory, Vol. 1, pp. 264-266.

5. Plaintiff's interrogatory #7 states: "[s]tate the amount of installation charge by each of the defendant cemeteries paid by lot owners who purchased the markers directly from the cemeteries of both single and double markers for the years 1960 through 1965." In response to this question, Roosevelt, Woodlawn, Rosewood and Princess Anne stated simply that the installation fee (charged to lot owners who purchase from the cemeteries) was included in the purchase price, without indicating the amount. Greenlawn made the conclusory statement that the fees were the same as charged to the plaintiff.

Fees Charged Plaintiff for Installing
44 x 14 Double Bronze Memorial Plaques

Rosewood	$154.00
Princess Anne	$154.00
Woodlawn	$175.00
Greenlawn	$160.16
Roosevelt	$123.20

Fees Charged Plaintiff for Installing
24 x 14 Single Bronze Memorial Plaques

Rosewood	$ 84.00
Princess Anne	$ 84.00
Woodlawn	$175.00
Greenlawn	$ 87.00
Roosevelt	$ 67.00

Roosevelt caters to a lower-income clientele. In the case of the other four memorial parks, the installation fees charged for 44 x 14 plaques fall within a range of $21. Woodlawn inexplicably charges the same fee for the installation of both sizes of markers. The fees charged by Rosewood, Princess Anne and Greenlawn for 24 x 14 markers fall within a range of $3. There is no evidence in the record explicative of such parallel behavior.

(4) All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement happens to be the same as manufacturer Matthews' markers and the same as is

implicitly suggested in a pamphlet ("Modern Cemeteries") distributed by Matthews to its customers.[6] All of the memorial parks except Roosevelt are customers of Matthews.

(5) There is evidence that Greenlawn,[7] Woodlawn[8] and Princess Anne[9] have attempted to dissuade lot owners from purchasing markers from the plaintiff. The affidavit of plaintiff's president states that numerous other incidents of this nature have occurred.[10]

(6) Defendant Matthews, in its pamphlet "Modern Cemeteries," suggests a number of practices which in effect erect competitive barriers to retailers other than the cemeteries themselves.[11]

(7) Many of these practices have been adopted by the memorial park defendants, as evidenced by affidavits in the record,[12] and by the "rule books" of Rosewood, Princess Anne and Greenlawn.[13]

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6. Matthews is under an injunction prohibiting it from making any suggestions to memorial parks as to the quality of markers installed in the parks. See note 19. However, on page 7 of "Modern Cemeteries," under the heading 'MEMORIALS," Matthews states this fact and then immediately below recites the alloy content of *its* markers. See "Modern Cemeteries" at 7.

7. Affidavit of Mrs. R. W. Garrett, Vol. 1, p. 287.

8. Affidavit of James A. Beasley, Vol. 1, p. 288.

9. Affidavit of Mr. and Mrs. G. C. Brehm, Vol. 1, p. 290.

10. Affidavit of Charlie C. Gregory, Vol. 1, pp. 264, 267-270.

11. "Our attorneys have indicated that any Cemetery would be well advised to notify all lot owners of the conditions in the Rules and Regulations relating to 'MEMORIALS' and the charges for installation and maintenance so that there cannot be allegations by lot owners, that they were not so notified." "Modern Cemeteries," p. 11.

"MEMORIAL RULES AND REGULATIONS"

1. "Oweing to changes made from time to time in the type of memorials permitted in various sections, it is suggested that Owners consult the Cemetery before orders are placed with memorial dealers, in order to comply with rules governing the type permitted in certain sections. Rules governing the erection of memorials are strictly adhered to."

2. "All mausoleums, monuments, memorials, headstones or structures of any kind must be built according to the rules and regulations of the Cemetery."

* * * * * * *

(Cont. page 14)

(8) There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews.[14]

I notice, also that this is at least the fourth time Matthews has been named co-defendant with memorial parks in antitrust actions attacking the same practices here under scrutiny. Each of the previous actions, *Booth v. Jas. H. Matthews & Co.*, No. 60-418-Civ. (W.D.Pa. 1963), *Kaeppler v. Matthews*, No. 25618-Civ. (E.D.Pa. 1963), and *United States v. Jas. H. Matthews & Co.*, No. 16818-Civ. (W.D.Pa. 1958), was settled by a consent decree enjoining the specific practices here under attack.[15] While no issue of fact

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(Footnote 11 cont. from page 13)

8. "Plans or sketches, with measurements, descriptions and specifications of all stonework or bronze to be placed in the Cemetery, must be submitted to the Management for examination and written approval before a foundation order for the work will be accepted; and in the case of monuments, memorials and mausoleums, detailed specifications must accompany the plans."

* * * *

11. "The Management reserves the exclusive right to reject all work which, on account of design, workmanship, material or faults of any kind, is in its opinion unsatisfactory."

12 "All foundations of any kind shall be installed by the Cemetery, the charges for which shall be reasonable and payable in advance."

* * * *

25. "All monuments, markers and memorials which do not conform to the rules and regulations in sections in which they are placed will be removed."

* * * *

29. "Cleaning of memorials by outside firms is not permitted."

"Modern Cemeteries," pp. 18C, 18D.

12. *See, e.g.*, affidavit of Charlie C. Gregory, Vol. 1, pp. 264-273.

13. Vol. 1, pp. 319, 332, 354.

14. See answers to plaintiff's interrogatories #8 and #9.

15. The decree in *Booth v. Jas. H. Matthews & Co.*, No. 60-418-Civ. (W.D.Pa. 1963), provided in its material respects:

* * * *

"V

"(A) Each of the cemetery defendants is enjoined and restrained from:

(cont. page 15)

was litigated or admitted in these cases, it is not unreasonable to suppose that such litigation is of interest to the trade, and if reported to the trade, would tend to "educate" defendants as to common methods of doing business.

(Footnote 15 cont. from page 14)

"(1) Requiring any person owning a lot or lots in any cemetery owned or controlled by it to purchase any marker from it.

"(2) Refusing to install a marker that complies with the conditions described in this Final Judgment in any section of its cemetery wherein markers are permitted, and refusing to permit the installation of such markers where the cemetery defendant itself declines to make the installation.

"(3) Discriminating between lotowners purchasing markers from it and lotowners purchasing markers from other persons in any or all the following respects:

"(a) the amount of charges for installation or maintenance of a marker;

"(b) the services included in the charges for installation and maintenance of a marker;

"(c) the period of time following delivery of the marker to the cemetery within which it shall be installed.

"(4) Informing its lotowners that markers cannot be purchased for installation in its cemetery from any person other than it."

Named as co-defendants with Matthews in this action were 19 Pennsylvania memorial parks: Forest Lawn Gardens, Inc., Sunset View Memorial Park, Penn-Lincoln Memorial Park, Inc., Rose Lawn Memorial Gardens, Inc., Sunset Hill Memorial Park, William Penn Memorial Park, Restland Memorial Park, Monongahela Valley Memorial Park, Sylvannia Hills Memorial Park, Inc , Allegheny County Memorial Park, Greene County Memorial Cemetery Company, Lafayette Memorial Park Cemetery, Greenwood Memorial Park, Inc., Westmoreland County Memorial Park, Inc , Somerset County Memorial Park, Lakewood Memorial Gardens, Inc., Hollywood Memorial Park, Inc., McKean Memorial Park.

An identical decree was entered against 15 Pennsylvania memorial parks (in both actions Matthews was dismissed as a party-defendant) in *Kaeppler v. Matthews*, No. 25618-Civ. (E.D.Pa. 1963). Enjoined from the practices recited above were the following: George Washington Memorial Park, Inc., Edgewood Memorial Park Company, Glenwood Memorial Gardens, Inc., Philadelphia Memorial Park, Inc., Rolling Green Memorial Park, Inc., Sunset Memorial Park Company, Valley Forge Gardens, Inc., Westminister Gardens Cemetery Company, White Chapel Gardens, Inc., Whitemarsh Memorial Park Cemeteries Company, Inc., Northhampton Memorial Shrine, Inc., Ceder Hill Memorial Park, Inc., Arlington Memorial Park, Forest Hills Memorial Park, Inc., Schuylkill Memorial Park, Inc., Sky-View Memorial Park, Inc.

In *United States v. Jas. H. Matthews & Co.*, No. 16818-Civ. (W.D.Pa. 1958), Matthews was enjoined from the following practices:

* * * * *

"V"

* * * * *

(Cont. page 16)

See Milgram v. Loew's, Inc., 192 F.2d 579, 584 (3rd Cir. 1951). The Matthews' pamphlet, "Modern Cemeteries," makes express reference to the antitrust troubles of the memorial park industry.[16]

(Footnote 15 cont. from page 15)

"(D) Making any suggestion or recommendation for any cemetery the purpose or effect of which is, or may be to eliminate or restrict sales, by any person, of bronze markers for installation in such cemetery.

* * * * *

"VI

"(A) The defendant is enjoined and restrained from, directly or indirectly, selling markers to any cemetery with knowledge that such cemetery:

"(1) reserves to itself the exclusive right to sell markers for installation within its confines; or

"(2) refuses to install bronze markers reasonably appropriate for installation in said cemetery, which are sold by other retail marker dealers;

"(3) has any rule, regulation, or follows any regularly established course of conduct which makes it unreasonably difficult or more costly to have installed within its confines bronze markers sold by persons other than such cemetery.

* * * * *

"VII

The defendant is ordered and directed not later than ten (10) days after the effective date of this Final Judgment:

"(A) To mail a copy of this Final Judgment to each person engaged in selling markers or monuments at retail, who, since January 1, 1954 has purchased, or who, to the knowledge of the defendant, has sought to purchase, markers from the defendant . . . . . "

The record does not indicate whether the defendants in this action received copies of the above-quoted consent decree.

16. See "Modern Cemeteries," pp. 1, 17.

EFFECT OF PARALLELISM

The only record evidence of profit margin enjoyed by the memorial park defendants in marker sales appears in the answer to interrogatories of Woodlawn Memorial Gardens, Inc. The record shows the retail prices charged by all of the memorial parks, but wholesale cost is reflected only as to Woodlawn. Woodlawn's cost and sale price of 44 x 13 double bronze memorial plaques is as follows:

YEAR	*COST*	*SALE PRICE*
1960	$100.00	$300.00
1963	$117.00	$350.00
1966	$125.00	$375.00

Woodlawn's cost and sale price of 24 x 14 single bronze memorial plaques is as follows:

YEAR	*COST*	*SALE PRICE*
1960	$ 56.00	$168.00
1963	$ 59.00	$175.00
1966	$ 63.50	$190.00

Woodlawn's answer to interrogatories indicates that the above-quoted fees include "all perpetual care, installation, and attendant service, together with guaranteed replacement, if necessary." If it can reasonably be inferred, as, infra, I think it can, that these expenses are negligible and/or are funded by an independent source, it would appear that defendant Woodlawn markets it goods at a 200 percent markup over cost.

A discovery exhibit indicates that the plaintiff's supplier, Meierjohan-Wengler, Inc., charges $76 for a 24 x 14 marker and $172 for a 44 x 14 marker, thus making plaintiff's wholesale costs greater than Woodlawn's. The record contains direct evidence of plaintiff's retail prices: a random sample of (record)

invoices dated 1963 through 1966 discloses that plaintiff has charged an average price of $175 for 24 x 14 single markers, and an average price of $338 for 44 x 14 double markers. The installation fee charged by the memorial parks is absorbed by the plaintiff and not passed on to the customer (except as contained in the price charged the customer for the marker). Inferring, as, infra, I think a jury reasonably could, that Woodlawn's overall costs (including perpetual care for the markers) are approximately the same as, or less than, plaintiff's, plaintiff is placed at an impossible competitive disadvantage by the enormous installation fee: in order to meet Woodlawn's price, plaintiff must suffer a loss on each sale of a 24 x 14 marker to a Woodlawn lot owner, *e g* ;

Retail sale price:		$190.00
Marker cost to Plaintiff	$ 76.00	
Installation fee	$175.00	
		$251.00
LOSS		$ 61.00

Moreover, it would appear that plaintiff can make only a gross profit of $38 on a sale of a 44 x 14 marker, *e.g* ,

Retail sale price:		$375.00
Marker cost to Plaintiff	$172.00	
Installation fee	$175.00	
		$347.00
PROFIT		$ 28.00

This is to be contrasted with Woodlawn's apparent gross profit of slightly less than $250 per marker for 1966, and the marker is one inch smaller than that offered by plaintiff.

Woodlawn presents the most extreme case, among the memorial park defendants, of the impact of the installation-fee practice on plaintiff's trading opportunities. But on the

same hypothesis the plaintiff's costs in sale of markers to be installed at all the defendant cemeteries is increased by the amount of the installation fee, from a high of $175 (Woodlawn) to a low of $67 (Roosevelt for 24 x 14 markers). Thus a jury could find that the installation-fee practice, together with other practices of the memorial parks, is calculated virtually to exclude plaintiff from the market.[17]

DEFENDANT'S BUSINESS JUSTIFICATION

The memorial parks contend that the installation fees charged are justified by the expenses of perpetual care and maintenance. Unquestionably, I think, a jury could find otherwise. Of the answers to interrogatories, only Greenlawn's indicates the actual maintenance involved in caring for the markers.[18] Of the answers to interrogatories, only Roosevelt's[19] discloses the portion of the installation fee (paid by plaintiff) allocated to perpetual care of the markers, which it claims is $10. There is no record evidence of actual outlays for marker maintenance. On the other hand, a maintenance form published by Matthews[20] states that "water"

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17. Plaintiff's president testified that Norfolk Monument has suffered extensive loss of marker sales because of the exclusionary practices here under attack. See discovery deposition of Charlie C. Gregory, Vol. III, pp. 59, 77-80.

18. See Vol. 1, pp. 130, 131. Greenlawn indicates that perpetual care for the markers involves only the following:

"1. Cleaning memorial periodically, usually every two to three weeks

"2. Trimming around memorial by hand during the growing season every 10 to 15 days. The type of grasses used are of the fast growing variety (Bermuda or Wild grass) specifically of which would grow completely across a marker in this period of time." *Id.* at 131.

19. Vol. 1. pp. 124, 125.

20. See Vol. 1, pp. 278, 279.

(rainwater?) is the best cleansing agent for the plaques. The discovery deposition of plaintiff's president, Charlie C. Gregory, contains the following testimony:

> (Mr. Gregory) "As far as perpetual care, if the cemetery deliberately goes out there and ruins the marker, then I would not be willing to replace it. But as far as lasting forever, it is of enduring metal. It will not deteriorate. It will not rust. What is perpetual care? No one gives a plaque perpetual care.
>
> "Q Are they polished?
>
> "A No, they are not polished.
>
> "Q Are they grass trimmed?
>
> "A That is maintenance of the cemetery. That is not for the plaque. That is your grass maintenance. The customer pays for that when he buys the lot.
>
> "Q In other words, your testimony would be that there is no such thing as perpetual care of a bronze marker?
>
> "A That is correct, yes, sir. All of the attention it ever needs is a little rain now and then to wash it off, or either a little water to wash it off.
>
> "Q So according to your testimony there would not be any reason for making any provision for perpetual care?
>
> "A That is correct, yes."

If in fact substantial outlays are required for marker maintenance (it seems doubtful on this record), it is clear that apart from installation-fee revenue, ample funds exist to provide for maintenance of the plaques. Each of the memorial parks is required by Virginia statute to maintain an "endowment trust

fund," for perpetual care purposes, of at least $25,000, 8 Code of Virginia § 57-35.2 (1968 Cum. Supp.),[21] and to attribute ten percent of the purchase price of each lot to the trust, 8 Code of Virginia § 57-35.3 (1968 Cum. Supp.).[22] The income from the trust can be devoted only to perpetual care purposes. 8 Code of Virginia § 57-35.8 (1968 Cum. Supp.).[23]

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21. "After June twenty-sixth, nineteen hundred and sixty-four, it shall be unlawful for any person, firm, association or corporation, hereinafter referred to as 'person,' owning, operating or developing any cemetery to sell or offer for sale in this State, either as principal or otherwise, any lot, parcel of land, burial or entombment right in such cemetery, and in connection therewith to represent to the public in any manner, express or implied, that the entire cemetery, a single lot therein, or burial or entombment right therein will be perpetually cared for, unless adequate provision has been made for the endowment care of the cemetery and all lots, burial or entombment rights therein as to which such representation has been made. Each person who shall undertake to develop any such cemetery after June twenty-sixth, nineteen hundred and sixty-four, shall deposit in a bank in this State in an irrevocable endowment trust fund a minimum of twenty-five thousand dollars before the first lot, parcel of land, burial or entombment right has been sold."

22. "Each person owning, operating or developing any such cemetery before or after June twenty-sixth, nineteen hundred and sixty-four shall hereafter deposit in a bank in this State, or in another state, if such person has, prior to June twenty-sixth, nineteen hundred and sixty-four, entered into a trust agreement by which he is required to make at least the minimum deposit required hereunder, a minimum of ten per centum of the selling price of each lot, interment right, and above ground crypts and niches, excluding below ground burial vaults, sold, which amount shall be paid in cash and deposited with the trustee of the care fund not later than thirty days after the close of the month in which payments on the sale are completed."

23. "The income from the endowment care fund shall be used solely and exclusively for the general care, maintenance, administration and embellishment of the cemetery and shall be applied in such manner as the person owning, operating or developing such cemetery may from time to time determine to be for the best interest thereof."

Hence I see no reason why a jury could not reasonably reject defendant's story and find, on the contrary, that the defendant memorial parks insist upon an exorbitant installation fee in order to exclude plaintiff from competing with their own retail sales of markers. Such as inference seems to me strongly supported by evidence that (a) actual installation costs $3 plus unskilled labor of two men for perhaps an hour, (b) the best cleaning agent is plain water and (c) adequate funds for perpetual care are required by law to be derived from lot sale revenues and income from the $25,000 minimum care fund. To insist in the face of such a record that charging plaintiff an installation fee of as much as $175 per marker is so clearly related to expense incurred that no other inference may be drawn seems to me patently absurd. At the very least there is presented a material issue of fact.

Thus, there is at best only questionable business justification for those parallel practices which tend to the virtual exclusion of plaintiff from the market. Further, I think the record presents an issue of fact for trial over whether the formation of those parallel practices resulted from individual or concerted action.

PROOF OF THE CONSPIRACY

Viewing the evidence most favorably to the plaintiff's case, *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), I think the answers to interrogatories, discovery exhibits and affidavits, together with the pleadings, present an issue of fact for jury trial as to the existence of a tacit agreement to limit and destroy the plaintiff's trading opportunities.

The evidence recited, *supra*, shows parallel behavior on the part of the memorial park defendants. That alone is not

enough. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, *supra*, at 658. However, I think the record justifies the inference, and a jury could so find, that the defendants were mutually aware of the others' restrictive practices Against the background of antitrust litigation over identical practices[24] (involving the defendant Matthews) such an inference seems clearly permissible. The Matthews pamphlet, "Modern Cemeteries," containing, *supra*, references to antitrust problems and suggestions to circumvent legal entanglement, could, I think, fairly be characterized as a "joint invitation" to participate in the tacit agreement here alleged. *Interstate Circuit v. United States*, *supra*. Moreover, as previously noted, the record does contain direct evidence of frequent conferences between the memorial parks and representatives of defendant Matthews, the alleged hub of the conspiracy.[25]

On facts closely analogous to those presented here, the Third Circuit has said,

> "Our starting point in analyzing the evidence is the complete unanimity with which all the distributors refused to license features on first run to plaintiff and the substantial unanimity with which they gave the Boulevard [plaintiff's drive-in theater] a 28 day [delayed showing] status . . . . This *uniformity in policy* forms the basis of an inference of joint action." *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951) (emphasis added).

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24. See note 15.
25. See note 14 and accompanying text.

Thus, in *Milgram*, evidence of conspiracy was found in participation in, or in mere acquiescence in, parallel business practices, even without a showing of invitation and acceptance such as was present in *Interstate Circuit*. *Id.* at 583-84.

In this case, the defendants' entitlement to summary judgment is rested on testimonial denials of the existence of an agreement, coupled with plaintiff's failure to come forward with direct evidence. "But in this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy." *Milgram v. Loew's, Inc.*, 192 F 2d 579, 583 (3rd Cir. 1951). While a party opposing a motion for summary judgment cannot rest on conclusory allegations, *Robin Construction v. United States*, 345 F.2d 610, 614 (3rd Cir. 1965), the burden is upon the movant to establish that no issue of fact remains for trial. *Liberty Leasing Co., Inc. v. Hillsun Sales Corp.*, 380 F.2d 1013, 1014 (5th Cir. 1967) The defendants have, in my opinion, failed to come forward with an explanation for their parallel behavior which a reasonable juror could not disregard.

Where the plaintiff's case necessarily turns on inference, and where it is not "quite clear what the truth is," *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. at 467, I would, in a conspiracy case, be disinclined to cut off the right to have a jury draw the proper inferences. *Poller v. Columbia Broadcasting Systems, Inc., supra; Devex Corp. v. Houdaille Industries, Inc.*, 382 F.2d 17 (7th Cir. 1967); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 485 (5th Cir. 1966); *Wurzberg Bros., Inc. v. Head Ski Co.*, 276 F. Supp. 142 (D.N.J. 1967).

Evidence of conscious parallelism raises fact issues requiring the trial judge to submit the issue of conspiracy to the jury. *Theater Enterprises v. Paramount Distrib. Corp.*, 346 U.S. 537, 542 (1954).

Finally, I think we should not overlook the fact that one of the major evils against which the antitrust acts were designed to guard is the exercise of "the power arbitrarily to enhance prices . . . ." *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 52 (1910). It is partially through the "private prosecution" of these antitrust suits that the congressional policy of protection of the public is implemented. I am not so naive as to suppose that mere admission of Norfolk Monument to competition will bring the high prices of grave markers tumbling down. But even a little competition may help — and a little competition can invite more.

I would affirm the district court as to defendant Jas. H. Matthews & Co. of *Virginia*, which appears to be in the case by error. As to the parent Matthews company and the other defendants, I would reverse and remand for trial by jury.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,230

Norfolk Monument Company, Inc.,

Appellant,

vs.

Woodlawn Memorial Gardens, Incorporated;
Rosewood Memorial Park, Incorporated;
et als.,

Appellees.

No. 12,231

Norfolk Monument Company, Inc.,

Appellee,

vs.

Woodlawn Memorial Gardens, Inc.,

Appellant.

No. 12,232

Norfolk Monument Company, Inc.,

Appellee,

vs.

Princess Anne Memorial Park, Incorporated,
and Rosewood Memorial Park, Incorporated,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk.

Upon the motion of the Norfolk Monument Company, Inc., by its counsel, and for cause shown,

It is ordered that the mandates in the above-entitled cases be, and they are hereby, stayed pending application of the Norfolk Monument Company, Inc., in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court within the time prescribed by law.

/s/ALBERT V. BRYAN
United States Circuit Judge

FILED NOV. 22, 1968
SAMUEL W. PHILLIPS, Clerk.

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Jo Ann C. Kirkpatrick/s/
Deputy Clerk

APPENDIX C

CIVIL ACTION NO. 5331

NORFOLK MONUMENT COMPANY, INC.,
Plaintiff,

v.

WOODLAWN MEMORIAL GARDENS,
INCORPORATED, et al,
Defendants.

ORDER

This action came on the 27th day of September, 1967, to be heard on the Motions for Summary Judgment heretofore filed by the defendant Jas. H. Matthews & Co., Jas. H. Matthews & Co. of Virginia, Greenlawn Cemetery Park Corporation, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated, and Woodlawn Memorial Gardens, Incorporated; upon the Motions to Dismiss the Plaintiff's action, filed by Greenlawn Cemetery Park Corporation, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated and Woodlawn Memorial Gardens, Incorporated; and upon the Motion of Woodlawn Memorial Gardens, Incorporated to strike the affidavits filed by the plaintiff in response to the Motions for Summary Judgment.

It is ORDERED that the motions of the several defendants to dismiss the plaintiff's action and the motion of the defendant, Woodlawn Memorial Gardens, Incorporated, to strike the affidavits filed by the plaintiff to be held in abeyance, decisions on said motions being rendered unnecessary by the judgment of the Court on the Motions for

Summary Judgment, to which action of the Court each of the movants object.

The Court having considered the pleadings filed herein, the depositions of the officers of the plaintiff, the interrogatories propounded by the plaintiff and answered by the defendants, the documents produced by the parties pursuant to appropriate motions and orders, the affidavits and briefs submitted in support of and in opposition to the motions, and having considered the argument of counsel, the Court finds, in accordance with its memorandum filed herein on the 3rd day of October, 1967, that no conspiracy or agreement existed between the defendants, or any of them, and that there is no genuine issue as to any material fact and that the defendants are entitled to judgments as a matter of law.

WHEREUPON, it is ORDERED that the defendants' Motions for Summary Judgments are granted and that this cause is dismissed at plaintiff's cost, with prejudice, to which action the plaintiff objects.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia, November 14, 1967.

APPENDIX D

NORFOLK DIVISION

CIVIL ACTION NO. 5331

NORFOLK MONUMENT COMPANY, INC.,
Plaintiff,

v.

WOODLAWN MEMORIAL GARDENS,
INCORPORATED, et al,
Defendants.

MEMORANDUM

The plaintiff, Norfolk Monument Company, is a local retail dealer in cemetery monuments and offers as part of its line, bronze cemetery markers which it sells and also installs.

The defendants are Jas. H. Matthews & Co., a cemetery marker manufacturer and wholesaler, Jas. H. Matthews & Co. of Virginia, a printing material distributor, and four memorial park type cemeteries in the Norfolk, Virginia area, namely, Woodlawn Memorial Gardens, Incorporated, Princess Anne Memorial Park, Incorporated, Rosewood Memorial Park, Incorporated, and Greenlawn Cemetery Park Corporation.

This suit was instituted on December 16, 1965, seeking treble damages and injunctive relief under the Sherman Anti-Trust Act, 15 U. S. C. A., §1 and 2, et seq., and charges that the ". . . said defendants have combined and conspired with the co-conspirators to monopolize, have attempted to monopolize, and have monopolized in aforesaid interstate trade and commerce in the manufacture, sale and distribution of the markers, in violation of Section 2 of the Sherman Act. . . ."

Specifically, the complaint says that the conspiracy is (a) aimed at preventing and restricting the sale of bronze markers in the defendants' cemeteries; (b) that defendants' cemeteries buy all their requirements from Matthews; (c) that markers, to be acceptable for installation in defendants' cemeteries, must be of a specific alloy content; (d) the alloy content of markers must be certificated; (e) defendants' cemeteries have unreasonable and illegal regulations mili-

tating against the sale of plaintiff's markers; (f) each of the defendant cemeteries refuses to allow anyone to install markers in its cemetery except itself; and (g) that the charges of each of the defendants for installation make it impossible for the plaintiff to compete with the sale of markers owned by the defendants' cemeteries, themselves.

Also, the plaintiff charges that the defendants, Matthews, have participated in conspiracy meetings with the defendant cemeteries; that the defendants, Matthews, have provided assistance to the conspiracy practices of the cemeteries; that the defendants, Matthews, have prepared and distributed a copy of rules and regulations containing restrictive material concerning sale of markers, and that there are no grave markers installed in any of the defendants' cemeteries, other than those of Matthews.

To the complaint all of the defendants have filed (1) Motions to Dismiss for lack of jurisdiction in that there is no substantial impairment of Interstate Commerce and in the alternative, (2) Motions for Summary Judgment based upon exhaustive discovery production of documents, affidavits and interrogatories.

In this case the "flow" or "current" of the markers in interstate commerce to the point of installation at the grave site is much more discernible than the vaults in *Lawson* v. *Woodmere, etc.*, 4th Cir. 217 F (2d) 148 (1954). There the vaults were purchased and stored on the cemetery property and resold from stock on hand to a local purchaser for local use. Judge Dobie was inclined, in *Lawson*, to believe that the "flow" of interstate commerce had ceased. Here, however, the bronze markers must be handled by the out of state manufacturer in each individual

sale as the proper inscriptions of name, date of death, etc., are added to each tablet. Under some arrangements, the Matthews Company agrees to a continuing obligation to accept the bronze markers back at a later date to fill in the information as to date of death of a surviving spouse; or, in the case of a "pre-need" sale, to accept the tablets back for proper inscription when bought by the deceased before his death.

The chain of events from the sale of a tablet manufactured in Pennsylvania, to a local cemetery, and resold by the cemetery to a local user, but which resale requires assistance of the Pennsylvania manufacturer in each individual sale as to applicable lettering, and with obligations on the out of state manufacturer to receive the tablet back later from the buyer, through the cemetery, for further inscription and handling, is much more perceptibly in an interstate stream than the vaults in *Lawson*. While the views expressed are unnecessary in light of the ruling hereinafter made on defendants' motions for summary judgment, if called upon to do so, the Court would overrule the Motions to Dismiss for lack of jurisdiction.

But the Motions for Summary Judgment present a different matter entirely. Conceding the necessary interstate commerce involvement to warrant jurisdiction it does not appear that a trial could avail the plaintiff anything.

The plaintiff corporation's principal officer, Mr. C. C. Gregory, has testified exhaustively under appropriate depositions and has been ordered to produce all other evidence tending to prove conspiracy. In answer to specific questions he has admitted that he has no letters, agreements,

correspondence, or any other testimonials to a conspiracy among the several defendants that he has not produced. The evidence he has offered does not show conspiracy.

Plaintiff's allegations that Matthews would sell only to cemeteries is negated by its own admission that it purchased from Matthews as late as 1965 and terminated such purchases only because it did not like the Matthews product and because Matthews was then a defendant in this suit.

Plaintiff's allegation that the defendant cemeteries bought only from Matthews was founded apparently on an inspection by the plaintiff's President of these cemeteries which indicated the installation of many of Matthews markers. He admitted, however, that he saw others and had had his company's markers installed therein on occasion. It was further shown that one defendant cemetery had no Matthews markers at all, that some had as many as fifty percent (50%) of a different brand; and that a composite reading of all of the installations in all of the cemeteries showed at least thirty percent (30%) of a different manufacturer.

Plaintiff's allegaton that it is not allowed to install markers in the defendant cemeteries is admitted by the defendants. Each reserves to itself the right to install all markers, regardless of from whom purchased. In view of the continuing obligation of perpetual care imposed upon the cemeteries, in its contracts with lot owners, in the light of the duty to preserve the cemetery property, all as provided in the cemetery sales agreements made plain to purchasers, such rules and regulations cannot be termed unreasonable. This applies as well to rules setting up specific alloy content as to bronze markers offered for installation and certification thereof.

The allegation that there is a conspiracy to be uncovered in the fact that the charges are made by the cemeteries for installation of markers, whether such charges be conscionable for unconscionable is not only not borne out but is denied in the plaintiff's own proffered exhibits of the different cemetery price scales. These show on their face a wide divergence of prices which would completely negative any systematic scheming or conscious parallelism. Plaintiff agreed that Matthews did not prescribe any charges.

The plaintiff knows of no meetings between the parties; the plaintiff argues that the book "Modern Cemeteries,—Recommendations for their Attorneys" prepared and distributed by Jas. H. Matthews & Co. of Pennsylvania in the interest of management and executives of the Modern Cemetery Industry, admittedly containing many suggestions picked up and inculcated into some of the defendant cemeteries' printed matters, is a hub of the conspiracy. Not so—the booklet itself, an Exhibit, could only be described as a form book. It specifically points out on page 5, that it contains suggested standards of fair and reasonable regulations which the cemetery would be advised to adopt but says that ". . . Jas. H. Matthews & Co. is not permitted to make recommendations and suggests that the reader consult his own attorney."

The plaintiff has been required, under proper appropriate motions, to produce his case. He has said in depositions that he has no evidence other than that proffered. Clearly, the evidence fails to state a case under the Sherman Act.

To put these parties to trial runs full face into the intent and purpose of Rule 56 of the Federal Rules of Civil Procedure. There not only is no genuine issue of

material fact of conspiracy, there simply is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more.

Under the circumstances, the Motion for Summary Judgment filed by each of the defendants will be sustained and will be entered upon receipt of a proper Order prepared by attorneys for the defendants and endorsed by all counsel.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
October 3, 1967